# STATE OF MICHIGAN

# COURT OF APPEALS

---

TELEGRATION, INC.,

Plaintiff-Appellant,

v

JOSEPH A. TACKETT, EDWARD J. HIRDES, and STANLEY R. MOYER,

Defendants-Appellees,

and

MICHAEL A. AMATO, GARY L. PARKER, CHRIS H. LAUFFER, DANIELLE NIKLOS, JEFFREY A. HEDEEN, BRENT L. KRIEG, GENNY GEORGEADIS, STEPHEN B. SCHELLING, KEVIN M. MURPHY, ARTHUR C. REAUME, GARY BRATTAIN, THERESA M. HEILMEIER, LYNN HOWELL and GREGORY A. SMALLEY,

Defendants.

---

UNPUBLISHED
July 14, 2005

No. 252950
Oakland Circuit Court
LC No. 03-050970-CK

Before: Neff, P.J., Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right, contending that the trial court erred when it dismissed claims against defendants Edward J. Hirdes, Stanley R. Moyer, and Joseph A. Tackett (collectively "defendants"), pursuant to MCR 2.116(C)(7), based on the agreements to arbitrate. We affirm.

Plaintiff first argues that its right to seek injunctive relief, in part to prevent defendants from disclosing confidential information and to compel cessation of their employment with its competitor, SBC, was not covered by the parties' agreement to arbitrate, and consequently, the trial court should have addressed its motion for injunctive relief. We disagree.

The enforceability of an arbitration agreement as well as the grant or denial of summary disposition are questions of law that this Court reviews de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). When reviewing a motion pursuant to MCR

2.116(C)(7) on the ground that a claim is barred because of an agreement to arbitrate, the plaintiff's well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.* at 694. This Court reviews a trial court's decision to grant or deny an injunction for an abuse of discretion. *Fritz v St Joseph County Drain Commissioner*, 255 Mich App 154, 157; 661 NW2d 605 (2003).

The Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*., articulates Michigan's strong public policy favoring arbitration. *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000). It provides, in part: "All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, *any controversy* existing between them, *which might be the subject of a civil action, except as herein otherwise provided*, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission." MCL 600.5001(1) (emphasis added); *Rembert v Ryan's Family Steakhouses, Inc*, 235 Mich App 118, 132; 596 NW2d 208 (1999). Arbitration is generally a matter of contract and arbitration agreements are generally interpreted in the same manner as ordinary contracts: they must be enforced according to their terms to effectuate the intention of the parties. *Bayati v Bayati*, 264 Mich App 595, 598-599; 691 NW2d 812 (2004). "To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 598 (2004), quoting *Huntington Woods v Ajax Paving Industries, Inc* (*After Remand*), 196 Mich App 71, 74-75; 492 NW2d 463 (1992). The court should resolve any doubts about the arbitrability of an issue in favor of arbitration. *Huntington Woods, supra* at 75.

Plaintiff concedes that there is a written contract with an arbitration clause that arguably covers the current dispute, but contends that the arbitration clause is only applicable to damage claims and exempts from arbitration the entry of a TRO, preliminary injunction, or permanent injunction. The agreement provides, in pertinent part:

> 5. Arbitration. *Any controversy or claim arising out of or relation to this Agreement, or the breach thereof,* shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, as modified by this Agreement, and judgment upon the award rendered by the arbitrator may be entered in any court of competent jurisdiction.
>
> * * *
>
> 5.2 Decision of arbitrator. The award or decision of the arbitrator shall be final and conclusive upon the parties.
>
> 5.3 Consent to jurisdiction. The parties consent to the jurisdiction of the Circuit Court of Oakland County, Michigan, as an appropriate court for the entry of judg[ ]ment upon the award rendered by the arbitrator.
>
> * * *

5.6 Damages. Notwithstanding any Rules of the American Arbitration Association which may be construed to the contrary, no exemplary or punitive damages may be awarded by the arbitrator. Damages awarded shall be limited to those available in Michigan in breach of contract litigation, excluding the foregoing and excluding any damages for mental distress.

* * *

5.10 Time limits. A demand for arbitration shall be filed with the American Arbitration Association on or before thirty (30) days after the occurrence of the event which gives rise to the controversy, claim, or claim of breach, or, if claimant was not aware of the occurrence at the time, within thirty (30) days after claimant should reasonably have been aware of it. Failure to file the demand for arbitration within the time limit is a waiver of the right to claim damages arising from the occurrence. . . .

6. Disclosure of Information/Restrictive Covenant/Confidentiality. . . .

* * *

Employee understands and agrees that Employer shall suffer irreparable harm in the event that Employee breaches any of Employee's obligations under this Agreement and that monetary damages may be inadequate to compensate Employer for such breach. Accordingly, Employee agrees, that *in the event of a breach or threatened breach by Employee of any of the provisions of this Agreement, Employer, in addition to, and not in limitation of any other rights, remedies, or damages available to Employer at law or in equity, shall be entitled to a temporary restraining order, a preliminary injunction and/or permanent injunction in order to prevent or to restrain any such breach by Employee . . . .*

* * *

7. Restrictive Covenant. For a period of one (1) year after the termination or expiration of this Agreement, the Employee shall not within a radius of 300 miles from present place of the Employer's business . . . be employed by . . . any business similar to the type of business conducted by the Employer at th[e] time this Agreement terminates. *In the event of the Employee's actual or threatened breach of this paragraph, the Employer shall be entitled to a preliminary restraining order and injunction restraining the Employee from violating the provision. Nothing in this Agreement shall be construed to prohibit the Employer from pursuing any other available remedies for such breach or threatened*

*breach, including the recovery of damages from the Employee*.[1] [Emphasis added.]

Plaintiff acknowledges that the agreement is silent regarding the proper avenue for injunctive relief, but argues that it can only be the circuit court. By statute, however, parties have the ability to arbitrate "any controversy . . . which might be the subject of a civil action." MCL 600.5001; *Watts, supra* at 608. The parties in this action expressed a clear intent to create a statutorily enforceable arbitration agreement, meaning that the agreement is irrevocable except by mutual consent, by inserting the provision for entry of a judgment upon the arbitrator's award. MCL 600.5011; *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999). Although the MAA provides some exceptions from its purview, such as collective bargaining agreements and certain real estate claims, it does not specifically exclude the arbitrator's ability to decide equitable remedies such as injunctive relief. *Rembert, supra* at 133. "The express exclusion of some claims implies the inclusion of those not mentioned." *Id*. Furthermore, while the terms of the parties' agreement grant plaintiff the ability to seek injunctive relief, the terms do not expressly exclude the granting of an injunction from the arbitrator's range of authority. The agreement, however, specifically restricts the arbitrator's authority to award exemplary or punitive damages. Therefore, we conclude that plaintiff's claim for injunctive relief is one covered by the scope of the arbitration clause. See *Fromm, supra* at 305-306; see also *Amtower v William C Roney & Co*, 232 Mich App 226, 233-234; 590 NW2d 580 (1998).

Even where injunctive relief is within the scope of the arbitration agreement, this Court has upheld a circuit court's decision to grant an injunction in aid of compulsory arbitration "where the power of an arbitrator to fashion a remedy in the event the grievances are upheld might be frustrated in the absence of a preliminary injunction, and where plaintiffs . . . have demonstrated irreparable harm in the absence of an injunction." *UAW Local 6000 v Michigan*, 194 Mich App 489, 508-509; 491 NW2d 855 (1992). In *UAW Local 6000*, a union challenged proposed layoffs and the transfer of research activities in violation of the parties' collective bargaining agreement. *Id*. at 507. The Court noted that it has long held that "a preliminary injunction may be appropriate in aid of the jurisdiction of the Michigan Employment Relations Commission when a party to a collective bargaining agreement files unfair-labor-practice charges regarding, for example, alleged improper subcontracting that would become irrevocable and beyond the power of MERC to remedy in the absence of an injunction." *Id*. at 508, citing *Van Buren Public School Dist v Wayne Circuit Judge*, 61 Mich App 6, 17; 232 NW2d 278 (1975).

Similarly, in *Performance Unlimited v Questar Publishers, Inc*, 52 F3d 1373, 1380 (CA 6, 1995), the Sixth Circuit held that the district court erred as a matter of law when it found that it could not enter preliminary injunctive relief because the dispute between the parties was the subject of mandatory arbitration.[2] In *Performance Unlimited*, the parties agreed that arbitration

---

[1] Although three separate employment agreements were executed, between each individual defendant and plaintiff, the contract language at issue is identical.

[2] We note that this Court is not bound by the decisions of the Sixth Circuit and other federal lower courts on this legal issue, although they may be persuasive authority. *Abela v GMC*, 469 (continued…)

"shall be the sole and exclusive remedy for resolving any disputes between the parties arising out of or involving [the] Agreement" sued upon. *Id*. at 1375. The trial court denied the plaintiff's motion for a preliminary injunction which would have required the defendant to pay royalties to the plaintiff while their contract dispute was resolved in arbitration. *Id*. The issue was one of first impression in the Sixth Circuit. The Court followed the reasoning of the First, Second, Third, Fourth, Seventh, and arguably the Ninth Circuits when it held that:

> [I]n a dispute subject to mandatory arbitration under the Federal Arbitration Act,[3] a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four criteria which are prerequisites to the grant of such relief. We further conclude that a grant of preliminary injunctive relief pending arbitration is particularly appropriate and furthers the Congressional purpose behind the Federal Arbitration Act, where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality because an arbitral award, at the time it was rendered, "could not return the parties substantially to the status quo ante." [*Id*. at 1380 (citations omitted; footnote added).]

The First Circuit explained the rationale behind this ruling:

> We believe this approach reinforces rather than detracts from the policy of the Arbitration Act, which was most recently described by the Supreme Court in *Dean Witter Reynolds v Byrd*, 470 US 213; 105 S Ct 1238; 84 L Ed 2d 158 (1985): "passage of the Act was motivated first and foremost by a Congressional desire to enforce [arbitration] agreements into which parties had entered." . . . We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, ipso facto, the meaningfulness of the arbitration process. [*Performance Unlimited, supra* at 1380, quoting *Teradyne, Inc v Mostek Corp*, 797 F2d 43, 51 (CA 1, 1986).]

Although *UAW Local 6000* involved arbitration not within the scope of the MAA and *Performance Unlimited* dealt with the Federal Arbitration Act, we find this reasoning persuasive and applicable to the case at bar. The trial court in the instant case denied plaintiff's motions for injunctive relief and granted summary disposition in favor of defendants because it found that plaintiff's claim fell within the parameters of the agreement to arbitrate. The trial court, however, granted injunctive relief against other defendants earlier in the proceeding. Additionally, based on the reasoning and holdings in *UAW Local 6000, supra* at 508-509, and *Performance Unlimited, supra* at 1380, the trial court was not precluded from rendering

---

(…continued)

Mich 603, 606-607; 677 NW2d 325 (2004).

[3] The Federal Arbitration Act, 9 USC 1 *et seq*., governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686 (1995).

injunctive relief where it would aid arbitration, where "the power of an arbitrator to fashion a remedy in the event the grievances are upheld might be frustrated in the absence of a preliminary injunction," and where plaintiffs "have demonstrated irreparable harm in the absence of an injunction." *UAW Local 6000, supra* at 508-509. Affording a party to an arbitration agreement such a remedy is reasonable and consistent with the Legislative intent behind the MAA to encourage arbitration of disputes where withholding injunctive relief would render the arbitration process meaningless because it could not substantially return the parties to the status quo. See *Performance Unlimited, supra* at 1380. Whether to ultimately grant such injunctive relief remains in the trial court's discretion. *Fritz, supra* at 157.

The trial court's decision, however, was not in error because the record indicates that plaintiff had not filed a timely demand for arbitration and would otherwise not have been entitled to initiate arbitration proceedings at the time it sought injunctive relief. Thus, the arbitrator's power to effectively arbitrate the issues was not in jeopardy. The agreements provided that plaintiff must file an arbitration claim within thirty days after plaintiff reasonably became aware of its claim or defendants' breach. Plaintiff was aware of defendants' breaches on at least August 28, 2003, when it filed its amended complaint, if not before. Pursuant to the language of the agreement, even if the trial court had considered plaintiff's request for injunctive relief and found such relief appropriate, defendants would only have been temporarily estopped from their employment with SBC or other appropriate action *pending* an arbitrator's determination of the issue. Plaintiff, therefore, must retain the ability to arbitrate in order to warrant the trial court's examination of its entitlement to injunctive relief. Because the record indicates that plaintiff has not retained its right to arbitrate, any decision the trial court made regarding injunctive relief would have been moot.[4] An issue is moot if events have rendered it impossible for this Court to fashion a remedy. *In re Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

Plaintiff also argues that the trial court should have conducted an evidentiary hearing regarding its entitlement to injunctive relief before dismissing its complaint. Although no testimony was introduced, the trial court held numerous hearings, considered several of the parties' motions, and entertained counsels' arguments on several occasions regarding plaintiff's right to seek injunctive relief in the trial court. MCR 3.310(A) requires only that "a hearing" be conducted before an injunction is granted, and this Court has held that an injunction can be granted absent an evidentiary hearing if a party's entitlement to an injunction can otherwise be established. *Campau v McMath*, 185 Mich App 724, 728; 463 NW2d 186 (1990). As explained above, the trial court did not err when it concluded that plaintiff's claim for injunctive relief was one that the parties contracted to resolve before binding arbitration. The court reached its decision after considering the evidence submitted, the counsels' arguments, and briefs filed. The court could not have issued injunctive relief to assist arbitration because no arbitration action was

---

[4] We note that even if plaintiff retained the ability to file a demand for arbitration, the issue of injunctive relief would still be moot. Defendants' employment with plaintiff was terminated in February and April 2002. Many of the covenants plaintiff claims were breached have a period of enforceability, such as the one-year prohibition on working in a similar business within three hundred miles, the two-year prohibition on soliciting plaintiff's customers, and the one-year prohibition on soliciting plaintiff's employees, which have already expired.

pending, and plaintiff otherwise had not retained the right to seek such action. No error occurred.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot